Office - Supreme Court, U.S.
FILED
JUL 12 1982
ALEXANDER L. STEVAS,
CLERK

82-58

IN THE

Supreme Court of the United States

October Term, 1982

NO.

GRAND FALOON TAVERN, INC.,
a Florida corporation,
Petitioner,

v.

ROBERT WICKER, individually and
as Chief of Cocoa Beach, Florida,
Police Department, and DAVE BROWN,
individually and in his capacity as
Major of the City of Cocoa Beach, Florida,
and AGATHA DOERER, RICHARD EASLEY,
NANCY HUEY, and MARY FRANCES VAUGHN,
individually and as members of the
Cocoa Beach City Commission
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RICHARD L. WILSON
1212 East Ridgewood Street
Orlando, Florida 32803
(305) 423-2934

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Does a ban on non-obscene nude dancing in alcoholic beverage establishments, imposed by a municipality without power under the Twenty-First Amendment to the United States Constitution, violate the First Amendment to the United States Constitution.

2. Does the ordinance in question meet the requirements of *United States v. O'Brien*, 391 U.S. 367 (1968).

INDEX

Page(s)

Questions Presented for Review i

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit 1-2

Opinion Below 2

Jurisdiction 2

Statement of the Case 2-3

Reasons for Granting the Writ

I. The Decision of the District Court, affirmed by the Court of Appeals, is in conflict with prior decisions of this Court. 4-8

II. The Record in this case does not support the Circuit Court's finding that the ordinance in question is a valid exercise of the City's police power, applying *United States v. O'Brien*. 8-9

Conclusion 9

Certificate of Service 10

Certificate of Attorney 10

TABLE OF AUTHORITIES

Page(s)

CASES:

California v. LaRue, ... 4,5,7
409 U.S. 109 (1972)

Doran v. Salem Inn, Inc., ... 4,5
422 U.S. 922 (1974)

New York State Liquor Authority v. Bellanca, ... 4,5
_____ U.S. _____, 101 S.Ct. 2599,
69 L.Ed.2d 357 (1981)

Schad v. Borough of Mount Ephraim, ... 5,6
____ U.S. _____, 101 S.Ct. 2176 (1981)

United States v. O'Brien, ... 4,7,8,9
391 U.S. 369 (1968)

Young v. American Mini Theatres, ... 4,5
427 U.S. 50 (1975)

STATUTES:

28 U.S.C., Section 1254(1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO.

GRAND FALOON TAVERN, INC.,*
a Florida corporation,
Petitioner,

v.

ROBERT WICKER, individually and
and as Chief of Cocoa Beach, Florida,
Police Department, and DAVE BROWN,
individually and in his capacity as
Mayor of the City of Cocoa Beach, Florida,
and AGATHA DOERER, RICHARD EASLEY,
NANCY HUEY, and MARY FRANCES VAUGHN,
individually and as members of the
Cocoa Beach City Commission,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

---

*Pursuant to Supreme Court Rule 28.1, Petitioner states that it is not a publicly traded corporation; there are no parent companies, subsidiaries, or affiliates.

Petitioner, GRAND FALOON TAVERN, INC., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on March 15, 1982, rehearing denied on May 27, 1982.

Opinion Below

The opinion of the Eleventh Circuit Court of Appeals and the order denying rehearing, appear in the Appendix hereto. The ruling of the district court on the amended complaint, and the final judgment of the district court are contained in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Eleventh Circuit was entered on March 15, 1982. A timely petition for rehearing was denied on May 27, 1982. On June 4, 1982, the Court of Appeals entered an order staying the mandate until July 6, 1982 to allow for the filing of this Petition for Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

STATEMENT OF THE CASE

The City of Cocoa Beach, Florida – a municipality not possessing the power to regulate alcoholic beverages under the Twenty-First Amendment to the United States Constitution – had two nude dancing establishments. One, "The Booby Trap," had a high incidence of police calls. The other,

Petitioner here, had no more police calls than those alcoholic beverage establishments in the city which featured no nude entertainment. See Memorandum of District Court, App. 17; Supplemental Stipulation of Fact, App. 13.

On December 6, 1979, the City Commission of Cocoa Beach, Florida enacted an ordinance which prohibited "topless" or nude dancing in establishments within the city where alcoholic beverages were sold. (The ordinance is reproduced in its entirety in the Opinion of the Circuit Court, App. 23-24.)

On December 21, 1979, the United States District Court for the Middle District of Florida (Reed, J.) entered a preliminary injunction against enforcement of the ordinance.

Final hearing was held on September 19, 1980, at which the only question presented to the District was whether the ordinance was overbroad in violation of the First Amendment to the Constitution of the United States. See Memorandum of Opinion, App. 18; Opinion of Circuit Court, App. 25.

The District Court ruled that: (1) the nude dancing was not expression but conduct; (2) there was a demonstrable relationship between nudity in alcoholic beverage establishments and criminal activity; and (3) the municipality, under its *police* power, could ban nude dancing without regard to whether it was obscene. See Memorandum of Decision, App. 16-20.

On March 15, 1982, the United States Court of Appeals affirmed, basing its ruling entirely on a categorization of the dancing as conduct. See Opinion of Circuit Court, App. 21-41.

Petition for Rehearing was timely filed, and denied on May 27, 1982. App. 42.

This Petition for Certiorari is timely filed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE DISTRICT COURT, AFFIRMED BY THE COURT OF APPEALS, IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

The Eleventh Circuit Court of Appeals, in its opinion, determined that nude dancing in bars is conduct containing some expression:

> ...We find it only necessary to conclude that nude entertainment necessarily involves a substantial degree of conduct, and that any artistic or communicative elements present in such conduct are not of a kind whose content or effectiveness is dependent upon being conveyed where alcoholic beverages are served....

App. at 31.

The Circuit Court then applied this Court's decision in *United States v. O'Brien*, 391 U.S. 369 (1968) to hold that the city "...has sufficiently justified the reach of [the ordinance] under the four part test of *O'Brien* and that the provision is therefore not facially invalid.

App. at 40.

The subject of nude dancing, particularly in establishments with alcoholic beverages, is not a novel issue before this Court. Indeed, the Court of Appeals, in its ten-page opinion, repeatedly cited four decisions of this Court concerning that very topic: *New York State Liquor Authority v. Bellanca*, _____ U.S. _____, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981); *Young v. American Mini Theatres*, 427 U.S. 50 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1974); and *California v. LaRue*, 409 U.S. 109 (1972).

Additionally, this Court decided *Schad v. Borough of Mount Ephraim*, _____ U.S. _____, 101 S.Ct. 2176 (1981) – a case presented to the Court of Appeals but never cited or referred to in that Court's opinion.

It is first interesting to note that in *each* of the five decisions of this Court concerning nude dancing, the Court has consistently determined that activity to be expression, protected by the First Amendment to the United States Constitution.

In *California v. LaRue, supra*, this Court found that the performances which led to the California ban on nudity in bars were more gross sexuality than communication. 409 U.S. at 117-18. Thus, it was conduct without a communicative element that was the target of the regulation. Further, the regulation was upheld under the Twenty-First Amendment, a provision not applicable in this case.

In *Doran v. Salem Inn, Inc.*, supra, this Court wrote:

> Although the customary "barroom" type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue*, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed. 2d 342 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances.

422 U.S. at 932.

Young v. American Mini Theatres, Inc., upheld the right of a local government to impose zoning regulations on otherwise protected First Amendment activities.

This Court held, in *New York State Liquor Authority v. Bellanca*, _____ U.S. _____, 101 S.Ct. 2600 that topless dancing, whether or not it was obscene, could be prohi-

bited in alcoholic beverage establishments because.

> Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-First Amendment.
>
> 101 S.Ct. at 2601.

Finally, in *Schad v. Borough of Mt. Ephraim, supra*, the Court dealt squarely with the issue of nude dancing under the First Amendment:

> Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952); *Schacht v. United States*, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970); *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d (642) (1974); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975). See also *California v. LaRue*, 409 U.S. 198. 118, 93 S.Ct. 390, 397, 34 L. Ed.2d 342 (1972); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61, 62, 96 S.Ct. 2440, 2447-2448, 49 L.Ed.2d 310 (1976). Nor may an entertainment program be prohibited solely because it displays the nude human figure. "Nudity alone" does not place otherwise protected material outside the mantle of the First Amendment.

Jenkins v. Georgia, supra, 418 U.S., at 161, 94 St.Ct., at 2755. *Southeastern Promotions, Ltd. v. Conrad, supra; Erznoznik v. City of Jacksonville, supra*, 422 U.S., at 211-212, 213, 95 S.Ct., at 2274. Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation. *Doran v. Salem, Inn, Inc.*, supra; *Southeastern Promotions, Ltd. v. Conrad, supra; California v. LaRue, supra*.

101 S.Ct. at 2181.

Nevertheless, the ruling below does place "nudity alone" outside the mantle of the First Amendment.

The City of Cocoa Beach justifies its ordinance on two bases: (1) that there is a relationship between nudity in bars and criminal activity, as shown by the fact that *one* of two topless bars in the city draws a large number of police calls; and (2) alcohol and nudity in bars, in the *opinion* of the police chief, increase the "chances of having trouble."

Neither of the city's arguments can justify a ban on First Amendment activity.

This Court could have upheld the regulation in *LaRue, supra*, on the same basis as the Eleventh Circuit upheld the Cocoa Beach ordinance. However, the Court found that the states' powers under the Twenty-First Amendment outweighed the First Amendment considerations.

This Court could have upheld the zoning ordinance in Mt. Ephraim, New Jersey as it applied to nude dancing only, by using the same approach as the Eleventh Circuit – *United States v. O'Brien*, 391 U.S. 367 (1968). Instead, the Court adhered to its past position that nude dancing is protected expression.

Now a municipality without authority under the Twenty-First Amendment has enacted an ordinance which prohibits nude dancing without regard to whether it is obscene, and without regard to the First Amendment.

Unless this Court grants the Petition for Writ of Certiorari and reverses the Eleventh Circuit, the City of Cocoa Beach will be authorized to ignore this Court's prior rulings on nude dancing and proceed without regard to the First Amendment of the United States Constitution.

II. THE RECORD IN THIS CASE DOES NOT SUPPORT THE CIRCUIT COURT'S FINDING THAT THE ORDINANCE IN QUESTION IS A VALID EXERCISE OF THE CITY'S POLICE POWER, APPLYING *UNITED STATES v. O'BRIEN*.

The Eleventh Circuit found that the Cocoa Beach ordinance met the test set forth by this Court in *O'Brien, supra*.

In the event the Court finds *O'Brien* to be applicable, Petitioner contends that the test has not been met.

The four requirements of *O'Brien* are: (1) is the ordinance within the constitutional power of the government: (2) does it further a substantial government interest; (3) is the interest unrelated to the suppression of free expression; and (4) is the restriction on First Amendment freedoms no greater than is essential.

Petitioner suggests, first, that the City does *not* have the power to ban nude dancing in bars absent a grant of authority under the Twenty-First Amendment. For the City to effect or enforce such a ban, the nude dancing would have to be obscene, which is not the scope of the ordinance here.

Second, the banning of nudity in the bars of Cocoa Beach

would not further a *substantial* government interest. Rather, it *might* (and the record below limits this statement to "might") reduce the number of police calls to one bar out of the many in the City.

Finally, a ban on protected expression at Petitioner's establishment – a business without any problem with police calls or criminal activity – could not be called the least restrictive method available, given the First Amendment considerations.

This Court should grant the Petition for Writ of Certiorari and reverse the Eleventh Circuit, on the basis that the record below does not meet the *O'Brien* test.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari in that (1) the Eleventh Circuit failed to follow this Court's prior rulings that nude dancing – outside the regulatory power power of the states under the Twenty-First Amendment – is protected expression under the First Amendment; and (2) the record below does not support the Eleventh Circuit's finding that the ordinance meets the four-part test of *O'Brien, supra*.

Respectfully submitted

RICHARD L. WILSON
1212 East Ridgewood Street
Orlando, Florida 32803
Telephone: (305) 423-2934

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of July, 1982, copies of this Petition for Writ of Certiorari were mailed, U.S. Postal Service, to William E. Weller, P. O. Box 1255, 101 N. Atlantic Avenue, Cocoa Beach, Florida 32931. I further certify that all parties required to be served have been served.

RICHARD L. WILSON

CERTIFICATE OF ATTORNEY

I, RICHARD L. WILSON, hereby certify that I am a member in good standing of the Bar of the United States Supreme Court, and was admitted to practice by the Court on January 14, 1980.

RICHARD L. WILSON
Attorney at Law